

BEFORE THE
STATE OF WISCONSIN
ELECTIONS COMMISSION

THE COMPLAINT of DEAN KNUDSON,
Complainant, against MEAGAN
WOLFE, Respondent

ADMINISTRATOR WOLFE'S RESPONSE TO THE AMENDED
COMPLAINT OF COMMISSIONER DEAN KNUDSON

Respondent Meagan Wolfe, Administrator of the Wisconsin Elections Commission, responds as follows to the Amended Complaint under Wis. Stat. § 5.06 filed against her by Commissioner Dean Knudson on December 9, 2020:

1. I am a resident of Wisconsin and a duly qualified elector in the State of Wisconsin

RESPONSE: Not disputed.

2. I am a member of the Wisconsin Elections Commission. As a member of the Commission, I have sworn that I will support the constitution of the United States and the constitution of the State of Wisconsin, and will faithfully discharge the duties of said office to the best of my ability.

RESPONSE: Not disputed.

3. The Wisconsin Elections Commission has the responsibility for administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns. Wis Stats 5.05(1)

RESPONSE: Not disputed.

4. As defined in Section 5.025, “In chs. 5 to 10 and 12, “commission” means the elections commission.”

RESPONSE: It is not disputed that the term “commission,” as used in Wis. Stat. chs. 5–10 and 12, is statutorily defined to mean the Wisconsin Elections Commission. It does not follow, however, that every statutory duty imposed on “the commission” in those chapters requires a specific vote or other specific action by the members of Commission itself. As discussed in the response to paragraph 7 below, many Commission functions may be delegated to the Administrator or Commission staff, and those functions may be carried out without specific, case-by-case authorization or other specific action by the Commission itself.

5. The elections commission consists of 6 members who are appointed for terms of 5 years. Wis Stat 15.61

RESPONSE: Not disputed.

6. The elections commission has the responsibility for the administration of chs. 5 to 10 and 12. Wis Stat 5.05(2w)

RESPONSE: Not disputed.

7. Any action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members. Wis Stat 5.05(1 e)

RESPONSE: Denied. Some Commission actions, by their nature, involve an exercise of judgment and discretion by the Commission, which necessarily requires the Commission to meet, deliberate, and vote on the proposed action.

When such an action is to be taken, Wis. Stat. § 5.05(1)(e) requires in most instances an affirmative vote of at least two-thirds of the Commission's members, unless the action relates only to procedure of the Commission. There are also some statutes that specifically authorize the Commission to take certain actions by vote of a majority, rather than by a two-thirds supermajority. *See, e.g.,* Wis. Stat. § 15.61(1)(b).

Many Commission actions, however, are ministerial acts, mandated by statute. Such ministerial functions do not entail an exercise of judgment or discretion by the Commission and may, therefore, be carried out without any vote by the Commission. Statutes often assign the duties of a governmental agency to the head of the agency—whether that be an individual public officer or a collective governmental body. As a practical matter, it would be impossible for an agency head to personally carry out or specifically authorize every particular action that is necessary to satisfy an agency's statutory duties. This is especially true of mandatory ministerial functions. The law accordingly recognizes that agency heads may delegate such functions to executive administrators and staff, and that those functions may be carried out without specific, case-by-case authorization or other specific action by the agency head. *See Park Bldg. Corp. v. Industrial Comm'n*, 9 Wis. 2d 78, 86 (1960); *School Dist. No. 3 of Town of Adams v. Callahan*, 237 Wis. 560, 564–66, 576 (1941).

This reasoning applies with special force to state boards and commissions that meet only periodically and that have members who frequently reside in different, mutually distant parts of the state. Such a governmental body obviously could not function, as a practical matter, if every ministerial duty assigned to it by statute required a separate vote of the body. The delegation principles described above thus allow governmental bodies to delegate such functions and to authorize administrators and staff to carry them out without a specific vote by the governmental body to authorize every such act. *See id.*

Furthermore, this delegation principle applies with even greater force to a body, like the Commission, that by design has an even number of members appointed on a bipartisan basis—a circumstance that is likely to generate frequent tie votes. *See Wis. Stat. § 15.61(1)(a)*. And the principle applies even more strongly to those bodies which, like the Commission, are subject to a statutory two-thirds supermajority requirement. *See Wis. Stat. § 5.05(1e)*. If such a voting requirement applied to every ministerial function of the Commission under Wisconsin's election laws, then not only would a special meeting of the Commission be required prior to every ministerial act by the Administrator or Commission staff, but also, whenever a two-thirds supermajority vote could not be obtained, the Commission would be blocked from carrying out mandatory duties imposed by Wisconsin's election statutes.

Such an outcome would be plainly unlawful. When the Legislature has directed the Commission to perform a particular act, the Commission is required to carry out that act, without regard to whether two-thirds of the commissioners assent to the legislative command. The affirmative vote of at least two-thirds of the Commission's members thus is not required every time the Administrator or Commission staff comply with a mandatory, nondiscretionary, ministerial duty of the Commission.

The Commission has itself formally recognized and accepted this principle by adopting a written Delegation of Authority that expressly delegates certain Commission functions to the Administrator, subject to enumerated conditions. It is undisputed that the Commission duly adopted the Delegation of Authority by a two-thirds vote of its members in 2018, and that it amended the Delegation of Authority by a similar vote in 2020.¹ Where such a delegation is in place and pursuant to its terms, the Administrator or Commission staff may carry out a ministerial function of the Commission without need for a specific vote or other affirmative act by the Commission itself.

As relevant to the present case, the Delegation of Authority expressly delegates to the Administrator the authority “[t]o certify and sign election

¹ A true and correct copy of the 2020 Delegation of Authority is attached as Wolfe Exhibit A.

related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission.” Wolfe Ex. A ¶ 1.b. That delegation is “subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine whether a special meeting is conducted before the action is taken.” 2020 Delegation of Authority.

Here, on November 30, 2020, the Administrator (and Commission staff working under the Administrator’s supervision) carried out the Commission’s mandatory duty under Wis. Stat. § 7.70(5)(b) to prepare a certificate showing the determination of the results of the state canvass of votes cast in the November 3, 2020, presidential election, and the names of the persons elected to serve as Wisconsin’s presidential electors. Before performing that act, the Administrator consulted with the Commission Chair, and the Chair directed that a meeting of the Commission would not be conducted before the action was taken. The Administrator thus satisfied the terms of the 2020 Delegation of Authority and, pursuant to her delegated authority, lawfully prepared the § 7.70(5)(b) certificate on behalf of the Commission.

8. The commission shall appoint an administrator. The administrator shall appoint such other personnel as she requires to carry out the duties of the commission. The administrator shall perform such duties as the commission assigns to him or her in the administration of chs. 5 to 10 and 12. Wis Stat 5.05(3d)

RESPONSE: Not disputed. However, in addition to duties assigned to the Administrator by the Commission, there are some duties that the Administrator performs without a specific assignment as part of the routine business of running an agency. There also are some statutes that directly assign certain functions to the Administrator or to a designee of the Commission Chair, who may be the Administrator in particular instances. *See, e.g., Wis. Stat. §§ 5.05(2m), (6a); 5.055; 5.056; 6.33(5)(a)3.; 6.36(2)(a); 6.95; 6.96; 7.70(3), (5)(a).*

9. The commission appointed Meagan Wolfe as administrator. Meagan Wolfe was confirmed by the senate to a four year term expiring in 2023.

RESPONSE: Not disputed.

10. The commission has assigned duties and delegated responsibilities to Administrator Wolfe through adoption of a Delegation of Authority document. At the February 27, 2020 meeting of the elections commission amendments were adopted modifying the Delegation of Authority document previously adopted on January 9, 2018.

RESPONSE: It is not disputed that the Commission has assigned duties and delegated responsibilities to Administrator Wolfe through various means, including the adoption of a Delegation of Authority document. The current Delegation of Authority document was adopted by the commission on February 27, 2020, and included amendments to the previous Delegation of Authority document that had been adopted in 2018. In addition, as discussed

in response to paragraph 8 above, the Administrator performs some duties that are not specifically assigned by the Commission.

11. A copy of the staff memo provided to the commission members for the meeting is attached. In the memo proposed additions are underlined and proposed deletions have strikethrough.

RESPONSE: Not disputed.

12. One of the amendments was to conform the language of the document to the statutory language in Sec 5.05(1 e). The new language requires the administrator to consult with the chairperson before exercising the delegated authority to determine whether a special meeting is conducted before action is taken.

RESPONSE: It is not disputed that new language was added to the 2020 Delegation of Authority. However, the complainant's characterization of the legal import of the new language is incorrect, in several respects.

First, the complainant asserts that the new language was added in order to conform the language of the Delegation of Authority to the statutory language in Wis. Stat. § 5.05(1e), which provides that certain actions by the Commission require an affirmative vote by at least two-thirds of its members. In support of that assertion, the complainant has submitted a February 27, 2020, memorandum in which Administrator Wolfe recommended to the Commission that it adopt the proposed new language and provided a detailed

analysis of the background and policy ramifications of the proposal.² Contrary to the complainant's assertion, however, that memorandum does not mention Wis. Stat. § 5.05(1e) or indicate that the proposed new language in the Delegation of Authority was intended to somehow conform to that statute.

Second, contrary to the complainant's suggestion, the new language that was added to the Delegation of Authority did not materially change the scope of the delegation to the Administrator of the authority to take the kinds of action at issue in the present case. Both before and after the revision, the document delegated to the Administrator the authority "[t]o certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission." *Compare* Wolfe Ex. A ¶ 1.b.; Wolfe Ex. B at 3. Prior to the 2020 revision, that authority (as well as certain other powers not at issue in this case) was delegated to the Administrator "subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine whether a special meeting *should be held*" Wolfe Ex. B at 3. (emphasis added). After the 2020 revision, the same authority was delegated "subject to the requirement that before it is exercised, the Administrator consult with the

² The exhibit submitted by the complainant is difficult to read. A true, correct, and more legible copy of the February 27, 2020, memo is attached as Wolfe Exhibit B.

Commission Chair to determine whether a special meeting *is conducted before the action is taken*” Wolfe Ex. B at 3. (emphasis added).

Both before and after that change, the Administrator was authorized to sign election-related documents on behalf of the Commission, provided that before doing so she consulted with the Chair to determine whether there should be a special meeting of the Commission. All that the new language did was clarify that, once the Administrator has consulted with the Chair, if it is determined that there will be a special meeting, then the Administrator may not take the action in question until after that meeting has occurred. However, where the Administrator consults with the Chair and it is determined that there will *not* be a special meeting, the Administrator may exercise the delegated authority without need for a vote or any other prior action by the Commission.³

13. The 2020 Delegation of Authority document does not authorize the administrator or the staff of the elections commission to “prepare a certificate showing the determination of the results of the canvass and the names of the persons elected” as presidential electors. Wis Stat 7.70(5)(b)

³ Other changes to the text of the Delegation of Authority in 2020 are not material to the issues in this case. The bulk of those changes imposed certain new preconditions on the Administrator’s delegated authority “[t]o issue compliance review orders under the provisions of Wis. Stat. § 5.06.” The 2020 revision also changed the Administrator’s delegated authority to make decisions about Commission litigation in communication with litigation counsel. The present case does not involve the exercise of either of those delegated powers by the Administrator, so those new provisions in the 2020 Delegation of Authority are not relevant here.

RESPONSE: Denied. The 2020 Delegation of Authority expressly delegates to the Administrator the authority “[t]o certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission.” The type of certificate that the Commission is required to prepare under Wis. Stat. § 7.70(5)(b)—*i.e.* a certificate showing the results of the state canvass of the presidential election and listing the names of the persons elected as presidential electors—plainly is an “election related document[]” and a “certification[] of election results.” The Administrator’s delegated authority to certify and sign such documents on behalf of the Commission thus includes the authority to prepare a certificate showing the determination of the results of the canvass of the presidential election and the names of the persons elected as presidential electors, pursuant to Wis. Stat. § 7.70(5)(b).

The complainant appears to suggest that the type of certificate referenced in § 7.70(5)(b) does not fall within the scope of the Delegation of Authority because it is not a “certificate of election.” That argument is unavailing because, without regard to whether a § 7.70(5)(b) certificate can be considered a “certificate of election,” it still certifies the results of a presidential election and thus indisputably is an “election related document” and a “certification[] of election results.”

The preparation of the § 7.70(5)(b) certificate at issue in the present case falls squarely within the scope of the 2020 Delegation of Authority. The Administrator did not sign the § 7.70(5)(b) certificate, but she supervised its preparation by Commission staff and personally facilitated its preparation by editing it to include the numbers from the certified statement and determination of the state canvass signed by the Chair pursuant to Wis. Stat. § 7.70(3)(g). The Administrator performed these activities both pursuant to the terms of the 2020 Delegation of Authority and at the direction of the Chair.

As required by the Delegation of Authority, the Administrator—prior to preparation of the § 7.70(5)(b) certificate—consulted with the Chair about whether a meeting of the Commission would be conducted before that certificate was prepared. The Administrator recommended to the Chair that a meeting be held, not because the Administrator believed that such a meeting was legally required, but because she believed that it would provide additional transparency to the certification process and would adhere to past practice of holding a meeting when one had been requested by a Commissioner. The Chair, however, directed that a meeting of the Commission would not be conducted before the certificate was prepared. The Administrator thereafter lawfully supervised and facilitated the preparation of the § 7.70(5)(b) certificate on behalf of the Commission, pursuant to her powers under the 2020 Delegation of Authority.

The Administrator’s interpretation of the 2020 Delegation of Authority as authorizing the actions at issue in this case was also consistent with established, routine procedures for certifying election results, under which Commission staff regularly prepare documents such as canvass statements or certificates of election without specific authorization or direction from the Commission itself. The Commission has never in its history voted on the certification of an election for any office, including President. In the presidential election of 2016, as in that of 2020, the § 7.70(5)(b) certificate was prepared without a prior vote by the Commission on certification of the presidential election. Likewise, routine documents related to the process of certifying a particular election have never been prepared for the Commission’s review, nor has the preparation of such documents ever been voted on as an action of the Commission. To the contrary, the Commission has long acquiesced in the view that—subject to the required consultation with the Chair, which was satisfied here—the Administrator has been delegated the authority to act on behalf of the Commission under Wis. Stat. § 7.70(5)(a) and (b).

14. The elections commission is required by law to “prepare a certificate showing the determination of the results of the canvass and the names of the persons elected” as presidential electors. Wis Stat 7.70(5)(b)

RESPONSE: It is not disputed that Wis. Stat. § 7.70(5)(b) expressly requires the Commission to “prepare a certificate showing the determination

of the results of the canvass and the names of the persons elected” as presidential electors. That duty, however, is a mandatory, ministerial duty of the Commission that does not require any exercise of judgment or discretion by the Commission, and it thus may be carried out without requiring a vote of the Commission.

In order to understand this point, it is necessary to carefully distinguish between the statutory powers of the Chair and those of the Commission in the election certification process.

Under Wis. Stat. § 7.70(3), the Chair or the Chair’s designee, not the Commission, is responsible for conducting the state canvass of the election and certifying the results of that canvass. First, the Chair or designee must publicly canvass the election returns from all the counties and make her “certifications and determinations.” Wis. Stat. § 7.70(3)(a). In performing that function, the Chair or designee shall review the certified statements of the county canvassing boards and take steps to get any mistakes corrected. Wis. Stat. § 7.70(3)(d). When the examination of the returns from the counties is complete, the Chair or designee must, in a Presidential election, make a statement of the total number of votes cast for President and Vice President. Wis. Stat. § 7.70(3)(d). After that, the Chair or designee must prepare a statement certifying those results, attach to that statement a certificate of determination which shall indicate the names of persons who have been elected

to any state or national office (here, that would be the names of the winning electors), and finally, deliver that statement and certificate of determination to the Commission. Wis. Stat. § 7.70(3)(g).⁴

The Commission, upon receiving that statement and certificate of determination from the Chair or designee, must prepare a certificate showing those state canvass results and listing the names of the winning electors, after which the Governor is required to sign that certificate, affix to it the great seal of the state, and transmit the certificate to the U.S. administrator of general services. Wis. Stat. § 7.70(5)(b). The Governor is also required to prepare six duplicate originals of the certificate and deliver them to one of the presidential electors on or before the first Monday after the second Wednesday in December. *Id.*⁵

The Commission's function under Wis. Stat. § 7.70(5)(b) thus is the mandatory, ministerial function of receiving the statement of the state canvass

⁴ In addition, where a recount has occurred, the Chair or designee is required to publicly examine the recount returns received from the county canvassing boards and to determine the results of the recount. Wis. Stat. § 9.01(5)(a) and (c). If those recount returns are received at least three business days before the statutory deadline for completing the state canvass, then the deadlines for determining the results of the recount and for completing the state canvass are the same. Wis. Stat. § 9.01(5)(c). If the recount returns are received later than that, then the deadline for determining the results of the recount is three business days after receipt of the returns. *Id.*

⁵ This is the date on which federal law requires the presidential electors to convene in their respective states as the Electoral College and cast their electoral votes for President and Vice President. *See* 3 U.S.C. § 7.

results from the Chair or designee and preparing a certificate that shows those results and lists the names of the winning electors. That statutory function does not require the exercise of judgment and discretion by the Commission. On the contrary, to the extent there is any judgment and discretion involved in determining and certifying the results of the election, the Legislature has statutorily assigned its exercise to the Chair under Wis. Stat. § 7.70(3), not to the Commission under Wis. Stat. § 7.70(5)(b). In dividing and allocating these statutory functions, the Legislature thus made a deliberate choice to assign the function of determining election results to a single state official, the Chair, rather than to a collective body, the Commission. The Chair's certification of the state canvass results may be subject to judicial review in a recount appeal proceeding under Wis. Stat. § 9.01(6), or in some other proper court proceeding, but the Commission has no authority under Wis. Stat. § 7.70(5)(b) to overrule or block the Chair's determination of the canvass. The Commission is required simply to prepare the prescribed certificate showing the canvass results received from the Chair.

Moreover, the Commission may delegate such ministerial functions to the Administrator and, through the 2020 Delegation of Authority, it has delegated to the Administrator the power to certify documents that certify election results, including a certificate under Wis. Stat. § 7.70(5)(b) showing the results of a presidential election. As discussed above in response to

paragraphs 13 and 14, the Commission has never voted as a body on the certification of an election for any office, including President, and has never required a vote of the Commission prior to the preparation of routine documents related to certifying a particular election.

15. A regular quarterly meeting of the elections commission was scheduled for December 1, 2020. The dates for regular meetings of the commission have sometimes been adopted by the commission well in advance based on input from staff regarding election events and deadlines. For example, the January 18, 2020 meeting date was set by commission action in 2018. The December 1, 2020 meeting was set by commission action at the September 24, 2019 meeting. One of the reasons for choosing the date of the December 1, 2020 meeting was to coincide with statutory deadlines related to the fall general election.

RESPONSE: These facts are not disputed. However, the date of the December 1, 2020, meeting was not chosen to provide the Commission with an opportunity to vote on the certification of the results of the fall general election. As already discussed, the Commission has never conducted such a vote and lacks statutory power to do anything other than to prepare the certificate prescribed by Wis. Stat. § 7.70(5)(b). The reasons for choosing the date of the December 1, 2020, meeting were primarily practical in nature. In 2019, when that date was chosen, in-person meetings were still the norm and it made sense, logistically, to consolidate the Chair's completion and certification of the state canvass with a regularly scheduled Commission meeting, in order to save

the Chair from having to make two separate trips to Madison—one for the completion of the state canvass and another for a meeting of the Commission.

16. On November 30, 2020, the day before the regular quarterly meeting of the commission which had been scheduled more than a year in advance, commission staff prepared a certificate showing the determination of the results of the canvass and the names of the persons elected" as presidential electors. The certificate was delivered to Governor Tony Evers who signed the certificate and immediately forwarded the signed certificate to the National Archives in Washington, DC.

RESPONSE: These facts are not disputed, but they are incomplete. Once the Chair had signed the statement of determination of the state canvass results, the Governor's office requested the unsigned § 7.70(5)(b) certificate so that the Governor could complete his responsibilities under that statute. Commission staff, acting at the Chair's direction and under the Administrator's supervision, entered the numbers from the 2020 certified canvass statement into a template document for a § 7.70(5)(b) certificate. The unsigned certificate was then provided to the Governor's office, as had been requested. The certificate template and the process of entering the canvass numbers were the same as in 2016 and earlier presidential elections, and the Commission staff did not make any changes to the certificate template other than entering the 2020 canvass numbers.

17. This action was not approved by an affirmative vote of at least two-thirds of the members of the commission as required by Sec 5.05(1 e).

RESPONSE: It is not disputed that the preparation of the § 7.70(5)(b) certificate was not approved by an affirmative vote of at least two-thirds of the members of the Commission. However, contrary to the complainant's assertion, Wis. Stat. § 5.05(1)(e) did not require such a vote, nor has the Commission conducted a vote prior to the preparation of the § 7.70(5)(b) certificate in prior Presidential elections. As previously discussed in the responses above, the Commission's duty to prepare a certificate under § 7.70(5)(b) is a mandatory, ministerial duty of the Commission that was lawfully delegated to the Administrator, and was lawfully carried out without prior review or vote by the Commission, consistent with long-established election certification practices.

18. The commission staff, at the direction and under the supervision of Administrator Wolfe, violated the law by taking this action. This is the first violation alleged in this complaint. Wis Stat 7.70(5)(b); Wis Stat 5.05(1e)

RESPONSE: Denied. The preparation of the § 7.70(5)(b) certificate by Commission staff under Administrator Wolfe's supervision was not unlawful. As shown above in response to previous paragraphs, a vote of the Commission was not required under Wis. Stat. § 5.05(1)(e) because the preparation of a § 7.70(5)(b) certificate is a mandatory, ministerial function of the Commission that was lawfully delegated to the Administrator, and was lawfully carried

out without prior review or vote by the Commission, consistent with the practice followed in earlier presidential elections.

19. There is no dispute that preparation of the certificate for the governor is a duty of the commission. The preparation of the certificate can not be considered as “procedural” under the limited exception allowed in Sec 5.05(1 e). The decision of when to prepare the certificate and when to send it to the governor was a duty given to the commission by law.

RESPONSE: Denied. Although the preparation of a § 7.70(5)(b) certificate is a statutory duty of the Commission, it is a mandatory, ministerial function that has been lawfully delegated to the Administrator. Regardless of whether that function is considered “procedural” within the meaning of Wis. Stat. § 5.05(1e), such a ministerial function does not involve the exercise of judgment or discretion by the Commission, and therefore can be delegated and carried out by a delegee without case-by-case voting by the Commission. And as previously discussed, the Commission has never conducted votes prior the preparation of § 7.70(5)(b) certificates and other documents related to certifying the results of particular elections.

In addition, to the extent, if any, that determining the specific *timing* of the preparation and transmission of a § 7.70(5)(b) certificate may allow for some exercise of discretion with regard to that discrete issue, that timing determination is itself a procedural function, and thus not subject to the two-thirds voting requirement of Wis. Stat. § 5.05(1e).

20. Even if Administrator Wolfe mistakenly believed she had the independent authority to “prepare a certificate showing the determination of the results of the canvass and the names of the persons elected” as presidential electors, despite there being no mention of this action in the Delegation of Authority document, there was no reason to take that action after 4pm the day before a regular meeting of the commission.

RESPONSE: Denied. First, as previously discussed in response to paragraph 13, the 2020 Delegation of Authority expressly delegates to the Administrator the authority “[t]o certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission,” and that delegated authority includes the authority to prepare a § 7.70(5)(b) certificate.

Second, the complainant’s allegation that there was no reason to prepare the § 7.70(5)(b) certificate after 4 pm the day before a scheduled Commission meeting is a conclusory assertion with no factual or legal support. It is also legally and factually inaccurate. The federal statute that parallels Wis. Stat. § 7.70(5)(b) requires the executive of each State to transmit a certificate of the ascertainment of that State’s presidential electors to the Archivist of the United States, and to do so “*as soon as practicable* after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment.” 3 U.S.C. § 6 (emphasis added). That federal statute thus required Governor Evers to transmit Wisconsin’s § 7.70(5)(b) certificate to the federal government

as soon as practicable after the Chair had certified the results of the state canvass of the Presidential election.

Consistent with that federal requirement, as soon as the Chair had signed the statement of determination of the canvass results on the afternoon of November 30, 2020, the Governor's office requested the unsigned § 7.70(5)(b) certificate so that the Governor could complete his statutory responsibilities. The Chair then directed the Administrator and Commission staff to comply with the Governor's request, which they did. Their action and its timing was also consistent with past practice. For example, in 2016, the results of the state canvass were certified and, at the request of Governor Walker, the § 7.70(5)(b) certificate was prepared and transmitted to the Governor, on the day before a regularly scheduled Commission meeting. Contrary to the complainant's suggestion, then, there was nothing legally or factually suspect about the timing of the preparation of the § 7.70(5)(b) certificate on November 30, 2020.

21. During the November 18, 2020 meeting of the commission, I requested a meeting of the commission to be held prior to taking action on this matter. On November 23, 2020 I wrote to Administrator Wolfe again expressing my request for a meeting prior to sending a certificate to the governor.

RESPONSE: These facts are not disputed, but they are incomplete. The Administrator is not a voting member of the Commission and the power to call a meeting of the Commission has not been delegated to her. Only the Chair can call a Commission meeting. After the complainant made his requests that

there be a Commission meeting prior to the preparation and transmission of the § 7.70(5)(b) certificate, Administrator Wolfe consulted with the Chair about that issue. The Administrator recommended to the Chair that such a meeting be held, not because she believed it was legally required, but because she believed that it would provide additional transparency to the certification process and would adhere to past practice of holding a meeting when one had been requested by a Commissioner. The Chair took the question under advisement and subsequently directed that a meeting of the Commission was not required and would not be conducted before the certificate was prepared. The Administrator had no authority to override the Chair's determination and, on November 30, 2020, she supervised and facilitated the preparation of the § 7.70(5)(b) certificate on behalf of the Commission, pursuant to her powers under the 2020 Delegation of Authority.

22. On November 30, 2020, Administrator Wolfe and commission staff began referring to the certificate required by law to be sent to the governor as a "statement of ascertainment". This term appeared in a press release posted on November 30, 2020 at 2:25pm, "As part of today's determination, a copy of the canvass determination for president and a *statement of ascertainment* will be sent to the Governor's office"
"<https://elections.wi.gov/node/7258>

RESPONSE: It is not disputed that the phrase "statement of ascertainment" was used in the referenced press release to designate the § 7.70(5)(b) certificate. On November 30, 2020, the Administrator and

Commission staff received many questions about “the Chair certifying the election.” That phraseology is ambiguous and potentially confusing and misleading, especially as applied to a presidential election.

As discussed above in response to paragraph 14, it is necessary to carefully distinguish between (1) the Chair’s function under Wis. Stat. § 7.70(3) of conducting the state canvass of the election and certifying the results of that canvass, and (2) the Commission’s function under Wis. Stat. § 7.70(5)(b) of preparing a certificate showing those state canvass results and listing the names of the winning electors. If one speaks about “the Chair certifying the election,” that distinction is blurred, which could lead to misunderstandings and confusion.

The risk of misunderstanding and confusion is further compounded by the fact that the process of certifying the election of presidential electors is statutorily distinct from the process of certifying the winners of elections to other state or federal offices.

For a presidential election, as previously discussed, the Commission is required to prepare a certificate showing the determination of the results of the state canvass of votes cast in the presidential election, and the names of the persons elected to serve as Wisconsin’s presidential electors, after which the Governor is required to sign that certificate, affix the great seal of the state, transmit the certificate to the U.S. administrator of general services, prepare

six duplicate originals of the certificate, and deliver them to one of the electors on or before the date on which the Electoral College convenes and votes. Wis. Stat. § 7.70(5)(b).

For other elections, the Commission is required, first, to “record in its office each certified statement and determination made by the commission chairperson or the chairperson’s designee.”⁶ Wis. Stat. § 7.70(5)(a). Next, after the time for filing a recount petition has expired and after any recount proceedings and appeals therefrom have been completed, the Commission shall make and transmit to each person declared elected a certificate of election under the seal of the commission.” Wis. Stat. § 7.70(5)(a).⁷

Again, if one simply speaks about “the Chair certifying the election,” the distinction is blurred between these two statutorily distinct certification processes, which could lead to misunderstandings and confusion.

⁶ This is the statement and certificate of determination issued by the Chair or the Chair’s designee following the completion of the state canvass. *See* Wis. Stat. § 7.70(3)(g).

⁷ For elections to the U.S. House of Representatives, the Commission is required to “prepare similar certificates, attested by the commission administrator, addressed to the U.S. house of representatives, stating the names of those persons elected as representatives to the congress from this state.” Wis. Stat. § 7.70(5)(a). For elections to the U.S. Senate, the Commission is required to “prepare a certificate of election for the governor’s signature, and the governor shall sign and affix the great seal of the state and transmit the certificate to the president of the U.S. senate. The certificate shall be countersigned by the secretary of state.” *Id.*

In an attempt to minimize the risk of the types of misunderstanding and confusion described above and to be careful and responsible in the use of terminology to describe the election certification process, the Administrator and Commission staff chose, in the press release of November 30, 2020, to refer to the § 7.70(5)(b) certificate as a “statement of ascertainment” because it is the document that officially memorializes the ascertainment of the names of persons elected as Wisconsin’s presidential electors. And in any event, the complainant has not indicated any way in which the terminology used in the press release is material to the legality of the Administrator’s actions in supervising and facilitating the preparation of the § 7.70(5)(b) certificate.

23. The press release also quoted Administrator Wolfe stating, “There is no certificate of election in a presidential contest.”

RESPONSE: This fact is not disputed. Administrator Wolfe’s statement was intended to highlight the fact that the type of certificate issued under § 7.70(5)(b) is not the same as the types of certificate of election that are more commonly issued under § 7.70(5)(a) to winners of other state or federal offices. The Administrator thus chose to not apply the phrase “certificate of election” to a § 7.70(5)(b) certificate, in order to highlight its distinct characteristics. *See Armes v. Kenosha County*, 81 Wis.2d 309, 318, 260 N.W.2d 515 (1977) (“Where the legislature uses two different phrases . . . in two paragraphs in the same section, it is presumed to have intended the two phrases to have different

meanings.”) (footnote omitted); *Operton v. Labor & Indus. Review Comm'n*, 2016 WI App 37, ¶ 11, 369 Wis. 2d 166, 177, 880 N.W.2d 169 (“when the legislature uses different terms within the same statute, they intend the terms to have distinct meanings”). And in any event, once again, the complainant has not indicated any way in which the Administrator’s above-quoted statement is material to the legality of her actions in supervising and facilitating the preparation of the § 7.70(5)(b) certificate.

24. Approximately 2 hours later the commission staff at her direction prepared and sent to the governor a document titled as a “certificate” of ascertainment. The term certificate of ascertainment does not originate in Wisconsin law but is a term used by federal officials.

RESPONSE: These facts are not disputed. The referenced document that was titled “certificate of ascertainment,” is the document that is referenced throughout these responses as “the § 7.70(5)(b) certificate”—*i.e.* the “certificate showing the determination of the results of the canvass and the names of the persons elected” as presidential electors. Wis. Stat. § 7.70(5)(b). The complainant has not indicated any way in which the use of the phrase “certificate of ascertainment” on that document is material to the legality of the Administrator’s actions in supervising and facilitating the preparation of the § 7.70(5)(b) certificate.

25. The statutory framework provided in Sec 7.70(5) clearly intends that the recount including any appeals to the recount should be complete prior to sending the certificate to the governor.

RESPONSE: Denied. The two separate paragraphs (a) and (b) of Wis. Stat. § 7.70(5) distinguish the certification process in presidential elections from the process in elections for other state and federal offices.

Certification of non-presidential elections is governed by Wis. Stat. § 7.70(5)(a). That provision expressly directs that the Commission may not issue a certificate of election until after the time for filing a recount petition has expired and after any recount proceedings and appeals therefrom have been completed. Wis. Stat. § 7.70(5)(a).

Certification of presidential elections, in contrast, is governed by Wis. Stat. § 7.70(5)(b). That provision, unlike § 7.70(5)(a), does *not* require the Commission to delay issuing a certificate until after the time for filing a recount petition has expired and after any recount proceedings and appeals have been completed. Rather, a § 7.70(5)(b) certificate can be issued any time after the Chair or the Chair's designee has certified the state canvass results under Wis. Stat. § 7.70(3)(g). The only temporal requirement in Wis. Stat. § 7.70(5)(b) is the requirement that the certificate must be prepared, and the Governor must transmit it to the federal government and to the electors, on or before the federally prescribed date on which the Electoral College must convene and vote.

Therefore, contrary to the complainant's assertion, the statutory framework provided in Wis. Stat. § 7.70(5) does *not* clearly intend that a recount including any recount appeals must be completed prior to sending the certificate to the Governor. Such a requirement exists only for non-presidential elections under § 7.70(5)(a), but does not exist for presidential elections under § 7.70(5)(b). If the Legislature had intended to impose such a time restriction on the issuance of a certificate under § 7.70(5)(b), it would have included language expressly creating such a restriction, as it did in § 7.70(5)(a).

The complainant appears to suggest that the requirements of § 7.70(5)(a) apply to *all* elections, including presidential elections, and that § 7.70(5)(b) merely provides some *additional* requirements that apply only to presidential elections. That suggestion, however, is incorrect for three reasons.

First, § 7.70(5)(a) expressly requires the Commission to “make and transmit to each person declared elected a certificate of election under the seal of the commission.” It is undisputed, however, that this type of certificate of election has never been transmitted to presidential electors, who instead receive duplicate originals of the different certificate prepared under § 7.70(5)(b). The inapplicability of that requirement to presidential elections refutes the complainant's suggestion that presidential elections are subject to the requirements of both § 7.70(5)(a) and (b).

Second, § 7.70(5)(a) itself includes separate and distinct certificate requirements for state elections, for elections to the U.S. House of Representatives, and for elections to the U.S. Senate. The fact that presidential elections have distinctive certificate requirements thus is not a sufficient reason for the Legislature to have placed them in a separate paragraph from other federal elections. The reasonable inference is that if the Legislature had intended for presidential elections to be subject to the requirements of § 7.70(5)(a), including that paragraph's special timing restrictions, then it would have included presidential elections in § 7.70(5)(a), alongside federal elections for the House and Senate. The fact that the Legislature did not do so, but instead placed presidential elections in a separate paragraph (5)(b) demonstrates that the Legislature intended the paragraph (5)(a) restrictions, including the timing restrictions, to apply to state elections and to federal House and Senate elections, but *not* to presidential elections.

Third, and most importantly, § 7.70(5)(b) expressly imposes on the certification of presidential elections its own special timing requirement that is inconsistent with the timing restrictions in § 7.70(5)(a). Specifically, a certificate prepared under § 7.70(5)(b) must be issued, and duplicate copies transmitted to the electors, on or before the first Monday after the second Wednesday in December, which is the federally prescribed date on which the Electoral College must convene and cast their electoral votes. If the restriction

in § 7.70(5)(a) applied in a presidential election, and if there was a recount appeal still pending on the first Monday after the second Wednesday in December (which could easily happen), then the Commission and the Governor would be precluded from preparing and transmitting the certificate by that date. That would violate § 7.70(5)(b), and Wisconsin would have no certified slate of presidential electors on the date when the Electoral College must convene and vote, leaving the state with zero certified electoral votes. The absolute, date-certain deadline in § 7.70(5)(b) is an unequivocal expression of legislative intent that Wisconsin should not be left with no certified electors on the date when the Electoral College must vote. Therefore, the incompatible time restrictions in § 7.70(5)(a) cannot apply to presidential elections. The complainant's contrary interpretation of § 7.70(5) would produce an absurd result, which the supreme court directs us to avoid. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663, 681 N.W.2d 110.

It is also important to note that the issuance of a § 7.70(5)(b) certificate prior to the completion of a recount appeal does not render the recount appeal meaningless. If a candidate prevails in recount litigation after issuance of that certificate, federal law provides for a governor to issue a second certificate conveying to Congress the results of the state court proceeding.

The procedures under Wis. Stat. § 7.70(5)(b) for preparing a certificate showing the results of the canvass of the presidential election and the names

of the chosen electors closely parallels the first part of the corresponding federal statute, 3 U.S.C. § 6. The second part of 3 U.S.C. § 6 then goes on to provide an additional procedure for reporting the outcome of any election contest that may take place in state court. Specifically, if there shall have been any final determination of a proceeding under state law for contesting the appointment of any or all of the state's electors, then the executive of the state is required, as soon as practicable, to send a "certificate of such determination" to the U.S. Archivist. 3 U.S.C. § 6. Then, prior to the first meeting of Congress thereafter, the U.S. Archivist must transmit copies of that certificate of final determination to each House of Congress. *Id.*

The two-part structure of 3 U.S.C. § 6 thus provides that a state governor, in some circumstances, might issue both a certificate of "ascertainment," which is based on the results of state election canvassing, and a certificate of "final determination" which reports the final outcome of any state election contest proceeding that may have been subsequently completed. Therefore, even if a Wisconsin state court were to reach a final decision in a recount appeal after a certificate of ascertainment had been issued under Wis. Stat. § 7.70(5)(b), the certificate of final determination process would ensure that Congress would be advised of the state court decision when it convened in joint session for the purpose of counting the electoral votes from all the states. *See* U.S. Const., Amendment XII; 3 U.S.C. § 15.

There is a fairly recent and significant historical precedent illustrating the different functions of a certificate of ascertainment and a certificate of final determination under 3 U.S.C. § 6. On November 26, 2000, Florida Governor Jeb Bush issued a certificate of ascertainment based on the initial certification of the election by the Florida Elections Canvassing Commission. Later, on December 13, 2000, Governor Bush issued a second Certificate of Final Determination of Contests Concerning the Appointment of Presidential Electors, which conveyed the final outcome of litigation in multiple courts contesting the initial election outcome that had been reflected in the original certificate of ascertainment. Therefore, when Congress met in joint session on January 6, 2001, it had the benefit of both certificates from Florida.⁸

Applying these principles to the present case, the Administrator supervised and facilitated the preparation of the § 7.70(5)(b) certificate on November 30, 2020, and the Governor transmitted that certificate to the U.S. administrator of general services on that date.⁹ President Trump subsequently filed a recount appeal, and the Wisconsin Supreme Court issued a final decision in that appeal on the morning of December 14, 2020, upholding the

⁸ An archived version of the two Florida 2000 certificates can be found at https://web.archive.org/web/20041203233758/http://www.archives.gov/federal_register/electoral_college/2000_certificates/ascertainment_florida.html.

⁹ The 2020 Wisconsin certificate of ascertainment is available online at: <https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf>

election outcome that had been previously certified on November 30. *Trump v. Biden*, 2020 WI 91, 951 N.W.2d 568. Thereafter, on December 21, 2020, the Governor issued and transmitted to the U.S. administrator of general services a certificate of final determination under 3 U.S.C. § 6, reporting the Wisconsin Supreme Court’s decision in the recount appeal.¹⁰ Therefore, both the November 30 certificate of ascertainment and the December 21 certificate of final determination were available to Congress when it met in joint session to count electoral votes on January 6, 2021. It is thus clear that the issuance of a § 7.70(5)(b) certificate prior to the completion of a recount appeal does not render the recount appeal process meaningless.

26. On November 29, 2020, Administrator Wolfe wrote to Chairperson Jacobs that it would be premature to prepare a certificate to send to the governor because “because the timeframe for appeal has not passed”. Email from Wolfe to Jacobs attached.

RESPONSE: This fact is not disputed, but it is incomplete and taken out of context.

When the November 29 email was written, the Administrator had not consistently and precisely distinguished between, on the one hand, the question of the permissible timing of a § 7.70(5)(b) certificate and, on the other hand, the question of the permissible timing of the determination of recount

¹⁰ The 2020 Wisconsin certificate of final determination is available online with the certificate of ascertainment at:
<https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf>

results and completion of the state canvass by the Chair or the Chair's designee under Wis. Stat. §§ 7.70(3) and 9.01(5). In part due to the blurring of that distinction, the Administrator, at the time of the November 29 email, was of the impression that a § 7.70(5)(b) certificate issued in a presidential election was similar to the types of election certificate issued to winning candidates in other elections under § 7.70(5)(a), and that certificates under both paragraphs were subject to the time restrictions in § 7.70(5)(a). Accordingly, the Administrator indicated in the email that a § 7.70(5)(b) certificate could not be issued until after the time for filing a recount appeal had passed and any recount appeal proceedings had been completed.

Subsequent to the November 29 email, the Administrator had further conversations about the above issues with the Chair, Commission staff, and legal counsel. As a result of those conversations, the Administrator formed a more precise understanding of the Chair's functions of determining recount results and completing the state canvass under Wis. Stat. §§ 7.70(3) and 9.01(5), and recognized that those functions of the Chair had to be completed in order to trigger the statutory timeline for a candidate to file a recount appeal under Wis. Stat. § 9.01(6). This more precise understanding of the distinctions among various statutory functions also led the Administrator to conclude that the time restrictions in § 7.70(5)(a) did not apply to presidential elections, and that, in such an election, a § 7.70(5)(b) certificate could be prepared before the

time for filing a recount appeal had passed and any recount appeal proceedings had been completed.

In addition, subsequent to the referenced email, the Administrator also reviewed the parallel facts from the 2016 presidential election. The Administrator determined that the Chair certified the 2016 recount results and the state canvass of the presidential election on December 12, 2016. Therefore, under Wis. Stat. § 9.01(6), the deadline in 2016 for filing a recount appeal was December 16, 2016. However, the 2016 certificate of ascertainment (*i.e.* the § 7.70(5)(b) certificate) was signed by Governor Walker and transmitted on December 12, 2016, which was *four days before* the deadline for filing a recount appeal expired. That prior practice supported and reinforced the Administrator's conclusion that the time restrictions in § 7.70(5)(a) did not apply to presidential elections, and that, in such an election, a § 7.70(5)(b) certificate could be prepared and transmitted before the time for filing a recount appeal had passed and any recount appeal proceedings had been completed.

In accordance with that conclusion, and notwithstanding the different view expressed in the November 29 email, the Administrator supervised and facilitated the preparation of the § 7.70(5)(b) certificate immediately after the Chair completed the recount determination and certification of the state

canvass on November 30, 2020, as described above in response to paragraph 13.¹¹

27. Wisconsin law requires that when a petition for recount is filed, the governor or commission may not issue a certificate of election until the recount has been completed and the time allowed for filing an appeal has passed, or if appealed until the appeal is decided. Wis Stat 7.70(5)(a)

RESPONSE: Denied. See response to paragraph 25 above.

28. Wisconsin law requires that certificates of election be prepared by the Commission. Wis Stat 7.70(5)(a).

RESPONSE: It is not disputed that Wis. Stat. § 7.70(5)(a) expressly requires the Commission to “make and transmit to each person declared elected a certificate of election under the seal of the commission.” For the reasons discussed above in response to paragraph 25, however, that requirement does not apply to the preparation of a § 7.70(5)(b) certificate in a presidential election. In addition, for the reasons discussed above in response to paragraph 14, the preparation of certificates under both paragraphs (a) and (b) of Wis. Stat. § 7.70(5) is a mandatory, ministerial duty of the Commission that has been lawfully delegated to the Administrator and may be carried out in particular elections without requiring an additional vote of the Commission.

¹¹ The Administrator also notes that, in addition to the matters discussed above, her November 29 email addressed several other points and successfully urged that prior Commission precedents, policies, and directives should be followed with regard to other matters related to the election certification process, such as public notice of the recount determination and certification of the state canvass and timely completion of voting machine audits.

Accordingly, as discussed above in response to paragraphs 13 and 14, the Commission has never voted as a body on the certification of an election for any office, including President, and has never required a vote of the Commission prior to the preparation of routine documents related to certifying a particular election.

29. Wisconsin law requires “The certificate shall be countersigned by the secretary of state. Wis Stat 7.70(5)(a)

RESPONSE: Denied in part. It is not disputed that Wis. Stat. § 7.70(5)(a) requires that election certificates in elections for the U.S. Senate must be countersigned by the Secretary of State. Under the plain language of § 7.70(5)(a), however, that countersigning requirement does not apply to election certificates in state elections or in elections for the U.S. House of Representatives. Furthermore, for the reasons discussed above in response to paragraph 25, the requirements in § 7.70(5)(a), including the countersigning requirement, do not apply to the preparation of a § 7.70(5)(b) certificate in a presidential election. In addition, the plain language of § 7.70(5)(b) expressly requires that a certificate prepared under that paragraph must be signed by the Governor and affixed with the great seal of the state, but it does not require countersigning by the Secretary of State.

30. For presidential electors, the commission shall prepare a certificate showing the determination of the results of the canvass and the names of the persons elected, and the governor shall sign, affix the great seal of the state, and transmit the certificate by

registered mail to the U.S. administrator of general services.
Section 7.70(5)(b)

RESPONSE: The referenced requirements of Wis. Stat. § 7.70(5)(b) are not disputed. However, for the reasons discussed above in response to paragraph 14, the preparation of a § 7.70(5)(b) certificate is a mandatory, ministerial duty of the Commission that has been lawfully delegated to the Administrator and may be carried out in particular elections without requiring an additional vote of the Commission. Accordingly, as discussed in the response to paragraph 14, the Commission has never voted as a body on the certification of a presidential election, and has never required a vote of the Commission prior to the preparation of a § 7.70(5)(b) certificate.

31. Commission staff prepared a certificate of ascertainment and transmitted the certificate to the governor between 4pm and 5:02pm on November 30, 2020. Email Wilman to Wolfe attached.

RESPONSE: Not disputed.

32. Governor Evers released a statement in the evening of November 30, 2020 announcing that he had signed a Certificate of Ascertainment to be sent to the National Archives.

RESPONSE: On information and belief, these facts are not disputed. However, once the § 7.70(5)(b) certificate was transmitted to the Governor's office, Administrator Wolfe had no further personal involvement in the process and had no contact with the Governor's office regarding their timeline or statement.

33. A copy of the document sent by Evers to the National Archives was already available online in the evening of December 1, 2020. The time stamp on the document posted on the Archives website shows posting at 2:59pm December 1, 2020. Accessed at <https://www.archives.gov/files/electoral-college/2020/ascertainment-wisconsin.pdf>

RESPONSE: The Administrator has no personal knowledge of these facts but, on information and belief, they are not disputed.

34. Wisconsin law allows for an aggrieved candidate to petition for a partial recount. In such cases, the law states “the opposing candidate, or any voter or other interested party including a municipality if on a referendum question, may similarly file a petition for recount in any or all of the remaining wards or municipalities in the jurisdiction or district. The petition shall be filed not later than 5 p.m. 2 days after the board of canvassers completes the first recount.” Wis Stat 9.01 (4)

RESPONSE: The referenced requirements of Wis. Stat. § 9.01(4) are not disputed.

35. In the current instance the time the [sic] period allowed for petition for full recount started upon the determination of the state canvass by the commission chairperson at approximately 3:30pm November 30, 2020. The commission administrator and the commission chairperson stated that the determination of the state canvass started the time for appeal under 9.01 (6)(a) because the appeal would be made on the basis of the official result. The same reasoning must apply to Section 9.01 (4) because until the recount results were canvassed by the chairperson, and the determination of the chairperson had been made, the interested parties could not know whether they had any reason to ask for a full recount.

RESPONSE: Denied in part. Any time an aggrieved candidate files a petition for a partial recount of some of the wards within a jurisdiction or

district, an opposing candidate has the right under Wis. Stat. § 9.01(4) to petition for recount in any or all of the remaining wards in the jurisdiction or district. Such a second recount petition can be filed any time after the filing of the first, partial recount petition, and it must be filed no later than 5 p.m. two days after the completion of the first recount. Contrary to the complainant's assertion, an opposing party could very well have reason to request a recount of additional districts before the Chair has determined the results of the first partial recount, and the plain language of § 9.01(4) clearly allows such a request.

Moreover, the complainant's argument about the timing of a second recount petition fails for the same reasons that undermine his argument about the timing of a recount appeal. With regard to both deadlines, the complainant essentially contends that, if a § 7.70(5)(b) certificate can be issued before the deadline to petition for a second recount, or before the deadline to file a recount appeal, then those two remedies would be rendered ineffectual because the outcome of the election would already have been decided. That contention is wrong, however, for the same reasons already discussed above in response to paragraph 25. If recount proceedings, including any appeal, are completed after the § 7.70(5)(b) certificate has been issued, then 3 U.S.C. § 6 would require the Governor to issue a certificate of final determination containing the results of the recount proceedings. This would be true regardless of whether

the recount proceedings resulted from a first recount, from a second recount, or from both.

36. In the current instance any voter, or other interested party, had the right to petition for a full statewide recount as long as the petition filed not later than 5pm on December 2, 2020.

RESPONSE: Denied in part. With regard to the 2020 presidential election, candidate Biden had the right to petition for a full statewide recount (or for a partial recount of some, but not all, districts outside Dane and Milwaukee Counties) not later than 5 p.m. on December 2, 2020. However, contrary to the complainant's assertion, voters and other interested parties did not have a right to petition for a second recount in the presidential election. Under the plain language of Wis. Stat. § 9.01(4), "any voter or other interested party including a municipality" may petition for a second recount only if the election is "on a referendum question." In a candidate election for public office, including a presidential election, only the candidates have the right to petition for a second recount under Wis. Stat. § 9.01(4). *See also* Wis. Stat. § 9.01(1)(a)1. ("Any candidate voted for at any election who is an aggrieved party . . . or any elector who voted upon any referendum question at any election may petition for a recount.") (emphasis added).

37. Wisconsin law allows for the appeal of a recount to district court. The time period allowed for the appeal to be filed is 5 business days after the determination of the commission chairperson. The law prohibits the issuance of a certificate of election until the time allowed for an appeal has passed.

RESPONSE: Denied. As discussed above in response to paragraph 25, the issuance of a certificate under Wis. Stat. § 7.70(5)(a) is prohibited until after the time allowed for an appeal has passed, but that time restriction does not apply to the issuance of a certificate under Wis. Stat. § 7.70(5)(b).

38. In Wisconsin under state law the appointment of presidential electors is by “election”. The United States Constitution, in Article II, Section 1, Clause 2 grants the authority over this process to the state legislatures. The constitutional wording, “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” has long been interpreted to grant maximum flexibility to the state legislatures as to the method of selecting those electors to be appointed.

RESPONSE: Not disputed.

39. Wisconsin law makes clear that presidential electors are elected. Section 5.10 states “Although the names of the electors do not appear on the ballot and no reference is made to them, a *vote for the president and vice president named on the ballot is a vote for the electors of the candidates for whom an elector’s vote is cast.* Under chs. 5 to 12, all references to the presidential election, the casting of votes and the canvassing of votes for president, or for president and vice president, mean votes for them through their pledged presidential electors.” Wis Stat 5.10

RESPONSE: Not disputed. However, for the reasons discussed above in response to paragraph 25, notwithstanding the fact that presidential electors in Wisconsin are elected by popular vote, the certificate issued in a presidential election is issued under § 7.70(5)(b), differs from an election certificate issued

under § 7.70(5)(a), and is not subject to the requirements of § 7.70(5)(a), including that paragraph's timing restrictions.

40. Wisconsin law makes clear that the certificate sent to the federal authorities must be a certificate showing the determination of the results of the canvass and **the names of the persons elected**". Wis Stat 7.70(5)(b)

RESPONSE: Not disputed. However, for the reasons discussed above in response to paragraph 25, notwithstanding the fact that Wis. Stat. § 7.70(5)(b) uses the phrase "persons elected" with regard to presidential electors, the certificate issued in a presidential election under § 7.70(5)(b) nonetheless differs from an election certificate issued under § 7.70(5)(a) and is not subject to the requirements of § 7.70(5)(a), including that paragraph's timing restrictions.

41. The certificate of ascertainment prepared by commission staff and sent to Governor Evers constitutes a certificate of election under Wisconsin law because electors are elected in Wisconsin, and state law requires that the governor send a "certificate" showing "the persons elected".

RESPONSE: Denied. The certificate of ascertainment to which the complainant refers was a § 7.70(5)(b) certificate. For the reasons discussed above in response to paragraphs 13, 23, and 25, such a certificate certifies the results of an election, but nonetheless differs from the types of certificate of election that are more commonly issued under § 7.70(5)(a) to winners of a state

or congressional office, and a § 7.70(5)(b) certificate thus is not subject to the requirements of § 7.70(5)(a), including that paragraph's timing restrictions.

42. Upon information and belief, Administrator Wolfe has relied upon advice from Attorney General Josh Kaul, or individuals working under the supervision of Kaul, in claiming that Section 7.70(5)(a) does not apply to presidential elections because it is "superseded" by Section 7.70(5)(b).

RESPONSE: Denied in part. It is not disputed that Administrator Wolfe relied in part on discussions with Wisconsin Department of Justice attorneys in reaching the conclusion that the timing restrictions on the issuance of election certificates under § 7.70(5)(a) do not apply to the issuance of a § 7.70(5)(b) certificate in a presidential election. The Administrator also relied on the advice of the Commission's in-house legal counsel and on past precedent, including the issuance of the § 7.70(5)(b) certificate in the 2016 presidential election and the handling of the 2016 presidential recount. It is denied that § 7.70(5)(a) is "superseded" by § 7.70(5)(b). The relationship between those paragraphs has been explained in detail in the above paragraphs in response.

43. Governor Evers had the Secretary of State countersign the Certificate prior to sending to Washington as required by Section 7.70(5)(a). Governor Walker did the same in 2016.

RESPONSE: It is not disputed that the Secretary of State, in addition to the Governor, signed Wisconsin's certificate of ascertainment in both 2016 and 2020. The Administrator lacks personal knowledge as to whether the Governor directed the Secretary of State to place his signature on the certificate in either

2016 or 2020. It is possible that the Secretary of State signed those certificates not at the direction of the Governor, but in his official capacity as the custodian of the great seal of the state. *See* Wis. Const. art. XIII, § 4; Wis. Stat. § 14.45(1). In any event, regardless of whether the Governor directed the Secretary of State to sign those certificates, it is clear from the plain language of Wis. Stat. § 7.70(5)(a) that the Secretary of State's counter-signature is statutorily required on a certificate of election to the U.S. Senate, but is not required on a certificate of election in a state election or in an election for the U.S. House of Representatives, nor is the Secretary of State's counter-signature statutorily required on a § 7.70(5)(b) certificate.

44. On November 30, 2020, Administrator Wolfe, or her staff at her direction, prepared the certificate showing the election of the Wisconsin electors, and sent the certificate to the governor, prior to the expiration of the time to request a full statewide recount. This is a violation of Sec 7.70(5)(a) as regards to the time period in Sec 9.01 (4). This is the second violation alleged in this complaint.

RESPONSE: The factual allegations in the first sentence of the paragraph are not disputed. The legal conclusions in the remainder of the paragraph are denied for the reasons discussed above in response to paragraphs 34 to 36.

45. On November 30, 2020, Administrator Wolfe, or her staff at her direction, prepared the certificate showing the election of the Wisconsin electors, and sent the certificate to the governor, prior to the expiration of the time to appeal the recount. This is a violation of Sec 7.70(5)(a) as

regards to the time period in Sec 9.01 (6)(a). This is the third violation alleged in this complaint.

RESPONSE: The factual allegations in the first sentence of the paragraph are not disputed. The legal conclusions in the remainder of the paragraph are denied for the reasons discussed above in response to paragraphs 25 to 27.

46. The Electoral College meeting date was December 19, 2016 with the safe harbor date 6 days prior. In 2016 Governor Walker sent his certificate of ascertainment just prior to the safe harbor deadline. The statewide recount had been completed and no “controversy or contest concerning the appointment of all or any of the electors” existed at the time he sent his certificate.

RESPONSE: Denied in part. It is true that the Electoral College meeting date in 2016 was December 19, 2016, and the safe harbor date was December 13, 2016. Governor Walker issued the 2016 certificate of ascertainment on December 12, 2016. As discussed above in response to paragraph 26, that action by Governor Walker took place four days before the deadline for filing a recount appeal expired on December 16, 2016. That fact is contrary to the legal position taken by the complainant in the present case.

The complainant appears to suggest that such action was permissible in 2016, but not in 2020, because in 2016 no “controversy or contest concerning the appointment of all or any of the electors” existed at the time the certificate was issued. That suggestion, however, is speculative and is based only on a quotation of language from the federal safe harbor statute, 3 U.S.C. § 5,

without any supporting allegations of concrete fact. While it is undisputed that no recount appeal was ultimately filed in 2016, the complainant has presented no evidence or allegations to establish that a recount appeal could not have been filed between December 12 and 16, 2016. The sequence of events in 2016 thus does not support the complainant's position here.

47. In contrast, in 2020 Governor Evers signed the certificate on November 30 when the petitioner for the recount had publicly stated the intention to appeal, when several legal controversies were pending action before courts, and before the time period for requesting a statewide recount had expired.

RESPONSE: The factual allegations in this paragraph are not disputed. Notwithstanding those facts, the issuance of the § 7.70(5)(b) certificate on November 30, 2020, was lawful for the reasons discussed above in response to paragraphs 25 to 27 and 34 to 36.

48. A document posted on the website of the National Archives instructs state officials to: "Send these (Certificate of Ascertainment) to the Archivist as soon as possible **after the general election results for your state are finalized**. This instruction from the Archivist is consistent with our Wisconsin law directing that a certificate shall not be prepared until the time period for recounts and appeals have expired or have been decided. It is also the precedent in Wisconsin.

RESPONSE: The factual allegation in the first sentence of this paragraph is not disputed. The legal conclusions in the remainder of the paragraph are denied. The language used on the website in question does not have the force of law and, in particular, is not probative of the meaning of

Wisconsin statutes. Moreover, the website's instruction that certificates of ascertainment should be submitted "as soon as possible after the general election results for your state are finalized" appears ambiguous, in that it could mean either "after the completion of the canvass of your state's general election" or "after the completion of both the canvass of your state's general election and any subsequent litigation contesting the results of that election." However, any such apparent ambiguity is easily resolved by referring to 3 U.S.C. § 6, which makes it clear that a certificate of ascertainment is to be submitted as soon as practicable after the identity of the winning electors has been ascertained through the state's canvass of the election results. This is in contrast to a certificate of final determination, which a state governor is required to submit following the final resolution of a subsequent "controversy or contest" concerning the appointment of the state's electors. In light of that statutory language, the website's instruction that certificates of ascertainment should be submitted "as soon as possible after the general election results for your state are finalized" must reasonably be construed to mean "after the completion of the canvass of your state's general election." Contrary to the complainant's suggestion, therefore, the language used at the website is consistent with the Administrator's actions that are at issue in the present case.

49. It is important that Administrator Wolfe and future administrators conform their actions to comply with the law.

RESPONSE: The Administrator agrees that it is important that she and future Administrators comply with the law. The Administrator further contends that her actions at issue in this case did comply with the law for the reasons stated in this document.

CONCLUSION

For the reasons stated above, Administrator Wolfe respectfully asks the Commission to issue an order in her favor denying and dismissing the Wis. Stat. § 5.06 complaint against her.

Dated this 13th day of January, 2021.

SIGNING AS TO ALL LEGAL ARGUMENT:

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Attorney General of Wisconsin



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SIGNING AND CERTIFYING AS TO ALL FACTUAL STATEMENTS:

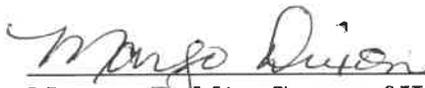
"I, Meagan Wolfe, being first duly sworn upon oath, state that I personally read the above answer and that the above factual statements in response to the complaint are true and correct based on my personal knowledge."



MEAGAN WOLFE
Administrator, Wisconsin Elections
Commission

Respondent

Subscribed and sworn to before me
this 13 day of January 2021



Notary Public, State of Wisconsin

My Commission expires: 7/19/2024